NTSB Order No.
EM-21

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.,
on the 23rd day of February 1972.

CHESTER R. BENDER, Commandant, United States Coast Guard

vs.

WILLIAM E. PACKARD

Docket ME-21

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision on appeal (Appeal No. 1830) affirming the revocation of his seaman's documents by Coast Guard Examiner Harry J. Gardner, acting under authority of 46 U.S.C. 239 b.[1] The basis for the Commandant's action was evidence brought out at an evidentiary hearing before the examiner, that on September 23, 1969, appellant was convicted in a Federal court of violating a narcotic drug law of the State of California. [2]

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[1]46 U.S.C 239 b, in relevant part, provides that: "The Secretary [of Transportation] may--...

(b) take action, based on a hearing before a Coast Guard examiner, under hearing procedures prescribed by the Administrative Procedure Act, as amended, to revoke the seaman's documents of--

(1) Any person who, subsequent to July 15, 1954, and within ten years prior to the institution of the action, has been convicted in a court of record of a violation of the narcotic drug laws of the United States, the District of Columbia, or any State or Territory of the United States, the revocation to be subject to the conviction's becoming final...."

We have previously held that the delegations of the Secretary of Transportation to the Commandant provide sufficient authority for his exercise of the power of revocation under 46 U.S.C. 239 b. See Commandant v. Snider, Order ME-2, adopted September 24, 1969; 49 CFR 1.46(b).

[2]Copies of the decision of the Commandant and the examiner are attached hereto.

The law under which appellant was convicted is section 11555 of the California Health and Safety Code, entitled "Opium Pipes." This provides that: "It is unlawful to possess an opium pipe or any device, contrivance, instrument or paraphernalia used for unlawfully injecting or smoking a narcotic." Since there is no penalty clause, sections 19 and 177 of the California Penal Code appear to be applicable, making any statutory offense for which the penalty is not prescribed punishable as a misdemeanor.

Appellant was so charged in a complaint filed by a United States Customs agent in the Federal court in California, pursuant to 18 U.S.C. 13, known as the Assimilative Crimes Act.[3] The charge was denominated a "petty offense," permitting the case to be tried before a United States Magistrate without a jury. 18 U.S.C. 1,3401-2.

It was alleged in the complaint that, on September 23, 1969, appellant and a female companion were entering this country from Mexico at Calexico, California, and were searched by customs officers, who found one and one-half marijuana cigarettes in his shirt pocket,a "marijuana roach holder," and less than one gram of marijuana in his companion's purse. Presumably on the theory that the customs station qualifies as a Federal enclave, the possession of "narcotic paraphernalia" in violation of the California law was alleged as a Federally-assimilated crime.

Arraigned before a magistrate of the Federal court for the Southern District of California, the defendants pleaded guilty and were convicted of "having in their possession a quantity of marijuana (narcotic paraphernalia) in violation of 18 U.S.C. 13 (violation of Section 11555 of the Health and Safety Code of State of California)." Appellant was fined $50 and his companion $25, or in lieu of these payments, they were ordered to serve one day at the county jail for each $5 of their fines.[4] The magistrates's judgment record also recites that the defendants waived their rights to counsel and a jury trial.[5]

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[3] 18 U.S.C. 13 incorporates by reference the State criminal law as the Federal criminal law within a Federal enclave, where no similar Federal offense is applicable.

[4]Appellant's assertion on appeal that he immediately paid the fine and was released is not disputed.

[5]Their written consent to be tried by the magistrate, although required to be filed with the judgment, was not offered in evidence at the examiner's hearing. See 18 U.S.C. 3401(b). However, in view of our disposition of this case, the missing document is not of

Appellant first challenges the magistrate's judgment for its inclusion of a marijuana possession offense under the "narcotic paraphernalia" statute, and on other grounds. We agree with the Commandant that the judgment is not subject to collateral attack in these administrative proceedings. However, the real issue before us is appellant's contention that the sanction of revocation is disproportionate to the petty offense.

Appellant argues that the authority to revoke a seaman's documents under 46 U.S.C. 239 b is permissive rather than mandatory. The Commandant accepts this proposition only to the extent of finding a prosecutory discretion within the Coast Guard, holding that: "Once action has been instituted and proof of conviction of a narcotic drug law violation has been established, revocation is the only order authorized by Congress." This interpretation is also reflected in the Commandant's regulations governing the examiners' order in such cases.[6]

We find, however, that in previous decisions in other cases, Commandants have vacated orders of revocation imposed by examiners under 46 U.S.C. 239 b, after weighing evidence favorable to the seamen involved. (See Commandant's Appeal Decisions Nos. 1513, 1514, 1594.) Moreover, while the instant case was pending on appeal before the Commandant, the Coast Guard regulations for marijuana offenses applicable to seamen employed aboard U.S. merchant vessels were revised and liberalized, within the purview of 46 U.S.C. 239(g). As of October 20, 1970, under these regulations, the Commandant has authorized examiners to enter an order less than revocation "in those cases involving marijuana, where the examiner is satisfied that the use, possession or association [with marijuana, for which the seaman is charged with misconduct,] was the result of experimentation by the person [so charged] and that the person has submitted satisfactory evidence that such use will not recur...."[7]

These revised regulations pertaining to marijuana offenses under 46 U.S.C 239(g), the discretion already exercised by Commandants under 46 U.S.C. 239b in previous cases, and the nature of the petty offense for which appellant was convicted and fined in 1969, all persuade us that the revocation action of the Commandant in this case should be modified. The difficulty of there being no

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concern.

[6]46 CFR 137.03-10(a).

[7]46 CFR 137.03-4; 35 Fed. Reg. 8291-2, 16371.

authority for imposing a sanction less than revocation under 46 U.S.C. 239b may be obviated by vacating the order at this time as Commandants have done in the past where, although serious narcotic drug law violations were involved, offsetting proof of rehabilitation was presented on appeal. Commandants made these past determinations in the belief that restoration of the individual's seaman's documents under all the attendant circumstances, would be consistent with the interest of safety at sea. This, in our view, comports more closely with the legislative intent of 46 U.S.C. 239 b than does the decision under review herein, where the Commandant makes no attempt to draw the nexus between the offense and the interests to be protected under statute.

As we pointed out in Commandant v.Snider,[8] the purpose of this statute, borne out by its legislative history, is to proceed against the seaman's documents of persons who, by their conviction of narcotic offenses ashore, are shown to be "ill-suited for employment aboard U.S. merchant vessels, for reasons that relate to the safety of life and property at sea." It is an anomaly clearly not intended by the Congress if, purely by virtue of different regulations of the Commandant, the seaman committing a marijuana offense ashore, while unemployed, is to receive a harsher sanction than the seaman committing the same offense while serving aboard ship. The authorization of Congress, referred to by the Commandant, cannot be conceived as intending such an unbalanced regulatory scheme.

In the interest of perpetuating the balance required by administrative due process, we hold that the single, isolated incident of appellant's wrongful possession of one and one-half marijuana cigarettes, for which he was convicted in 1969, establishes no more than experimental use of the prohibited substance by him. As such, it does not support the determination that he represents a continuing threat to safe operation aboard ships on which he would serve.

The fact remains that appellant's counsel presented no evidence tending to show that his use of marijuana will not recur. That is unfortunate but may, to a considerable degree, be attributed to the mandatory tone of the Commandant's previous

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[8]Footnote 1, supra, at 8-9. The Snider case involved a conviction for violation of Section 11500 of the Health and Safety Code of California. This was a serious offense for possession of narcotics "other then marijuana" and carried a penalty of 2 to 10 years imprisonment for the first offense. Our decision in Snider is thus clearly distinguishable from the one at hand.

regulations concerning marijuana offense under 46 U.S.C. 239(g), and those still pertaining to 46 U.S.C. 269b. At this juncture, nonetheless, we are inclined to give the benefit of the doubt to appellant, believing that the enforcement actions taken to date are sufficient to assure him of the serious consequences for his repetition of an offense involving marijuana.

Furthering this assurance, again following the salutary precedent of previous Commandants' decision, we affirm the findings made below pursuant to 46 U.S.C. 239b, that appellant has been convicted of a narcotic drug law violation, involving his possession of marijuana in 1969, while holding seaman's documents.[9] The Coast Guard records of such findings are not expunged by virtue of this decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal be and it hereby is denied except insofar as modification of the Commandant's order is provided for herein; and

2. The revocation order of the Commandant be and it hereby is vacated and set aside, and shall terminate as of the date of service appearing on the face of this order.

REED, Chairman, LAUREL, McADAMS, THAYER, and BURGESS, Members of the Board, concurred in the above opinion and order.

(SEAL)

[9]To the extent that appellant's prior conviction rested on his possession of a marijuana roach holder, it is disregarded in view of the Commandant's decision in Appeal No. 1513, which held that a prior conviction for "unlawful possession of a hypodermic needle and other equipment used to inject narcotic drugs" was not actionable under 46 U.S.C. 239b.